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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1040

QUINAULT TRIBE OF INDIANS, PETITIONER

v.

A. M. GALLAGHER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of March 20, 1967, inviting the Solicitor General to file a brief expressing the views of the United States in the instant case. The question presented is whether the laws of the State of Washington have been extended to the reservation of the Quinault Tribe of Indians as a result of action taken by the State pursuant to P.L. 83-280, 67 Stat. 588 (referred to throughout this litigation as "Public Law 280").

STATEMENT

Public Law 280 was enacted in 1953 to accord States the opportunity to assume—with exceptions not here relevant—civil and criminal jurisdiction over

Indian reservations located within their borders. Five States—California, Minnesota, Nebraska, Oregon and Wisconsin—were, under the provisions of Public Law 280, expressly ceded such jurisdiction over almost all Indian reservations within those States.[1] With respect to the other States, Sections 6 and 7 of Public Law 280 provided as follows:

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> SEC. 7. The consent of the United States is given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

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[1] Alaska was added to that list in 1958. 72 Stat. 545. Iowa, Kansas and New York had previously been granted varying degrees of jurisdiction. 62 Stat. 1161; 54 Stat. 249; 62 Stat. 827; 62 Stat. 1224; 64 Stat. 845.

The State of Washington's Enabling Act, 25 Stat. 676, 677 (which applies also to the Dakotas and Montana), contained a provision requiring it to include in its constitution a disclaimer of jurisdiction over Indian territory.[2] Pursuant to this requirement Article 26 of the Washington Constitution—which is titled "Compact with the United States"—reads:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—
>
> * * * the people inhabiting this state do agree and declare that they forever disclaim all right and title to * * * all lands lying [within the boundaries of this state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * *.

Seeking to exercise the authority conferred by Public Law 280, the State of Washington enacted a statute in 1957 authorizing the governor to extend State criminal and civil jurisdiction to a tribal reservation upon receipt of a formal request from the "tribal council or other governing body" of the tribe "expressing its desire" to be subject to such jurisdiction. Rev. Code Wash. Ann. § 37.12.020; Pet. 42. The "Business Committee" of the Quinault Tribe submitted a resolution to the governor in April 1958

[2] Eight States (including Arizona, New Mexico, Oklahoma and Utah) have similar provisions in their enabling acts and similar constitutional disclaimers.

assertedly expressing the tribe's desire to be subject to the State's civil and criminal jurisdiction. In May 1958, the governor issued a proclamation placing the Quinault Reservation under State jurisdiction. Certain members of the Quinault tribe thereupon challenged the proclamation on the ground that the petition to the governor was not authorized by the governing body of the tribe. That challenge was litigated in the State courts, where it was determined that the courts would not look behind the governor's decision to treat the petition as validly authorized. *State* v. *Bertrand,* 61 Wash. 2d 333, 378 P. 2d 427.

In 1963, the Washington legislature repealed the 1957 statute and enacted a new measure which extended the State's jurisdiction, with respect to eight enumerated subjects,[3] to all Indian lands held in fee within the State. That statute also empowered the governor, upon receipt of an appropriate petition from a tribe, to proclaim the State's civil and criminal jurisdiction with respect to other subjects, and it retained in effect all outstanding proclamations. Rev. Code Wash. Ann. § 37.12.010–37.120.070; Pet. 40–47. In 1965, after the present action was begun (and after the complaint had been dismissed by the district court), the governor issued a proclamation withdrawing the 1958 proclamation respecting the Quinault tribe on the ground—stated in the preamble thereto—

[3] The subjects were: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon public streets, alleys, roads and highways.

"that it was not the will of the majority of the Quinaults to petition for State jurisdiction in 1958."[4]

The present action was instituted by petitioner in 1964 in the United States District Court for the Western District of Washington. Petitioner sought an injunction against the operation of State law and a declaration that the 1957 and 1963 statutes were invalid. The principal ground asserted was that the State of Washington had failed to comply with Section 6 of Public Law 280 because it had extended State jurisdiction by statute rather than by amending the State constitution. Petitioner also contended that the partial extension of jurisdiction accomplished by the 1963 statute was not permitted by Public Law 280. The district court dismissed the complaint (Pet. 34–35). The court of appeals affirmed, first because it concluded that jurisdictional prerequisites had not been satisfied (368 F. 2d 648; Pet. 18–27) and, subsequently, when a new jurisdictional statute (28 U.S.C. 1362) was called to its attention, on the ground that the action taken by the State of Washington complied with the requirements of Public Law 280 (368 F. 2d 654; Pet. 28–33).

DISCUSSION

The issues presented to the court below were, we believe, correctly decided. They are, however, important questions affecting the avenues available under Public Law 280 to States other than Washington which have substantial Indian populations and are

[4] We have reproduced the 1965 proclamation as an appendix to this memorandum (*infra*, p. 11.)

presently limited by similar disclaimers in their constitutions. See note 2, *supra*. Some of the States affected by the issues presented are in the Eighth and Tenth Circuits, and the decision below would, therefore, not be conclusive with respect to the validity of parallel statutes in those States. Uncertainty in this area is obviously most undesirable because it is likely to produce conflicts or gaps in the administration of civil and criminal laws. Consequently, we agree with the parties that review by this Court would be appropriate. We also note that, in light of the 1965 proclamation by the governor which revoked the 1958 assumption of State jurisdiction, there is an additional issue in the case on which we take a view contrary to that of both parties. As we explain more fully below, we believe that that issue should now be considered by the Court even though it was not contested below and is not, in a formal sense, part of the record.

1. The Supreme Court of Washington has squarely held that Article 26 of the State constitution authorizes the State legislature to assume jurisdiction over an Indian reservation by statute, and that it need not be done by constitutional amendment. *State* v. *Paul*, 53 Wash. 2d 789, 337 P. 2d 33, appeal dismissed, 361 U.S. 898. It is clear, therefore, that the 1957 and 1963 statutes were valid assumptions of jurisdiction *under State law*. Petitioner contends, however, that federal, and not State, law governs the validity of action taken by the State pursuant to Public Law 280. The federal statute does not, of course, speak expressly of

either State or federal law, and it may be true that Congress believed that ordinarily States would, by force of their own law, be required to overcome constitutional disclaimers by constitutional amendments. The plain purpose of Section 6, however, was "to remove any legal impediments to the assumption of * * * jurisdiction" (see S. Rep. No. 699, 83d Cong., 1st Sess., pp. 6–7; H. Rep. No. 848, 83d Cong., 1st Sess., pp. 6–8), and we believe that Congress intended thereby to leave to State law the procedure whereby impediments attributable to State law might be overcome. Washington's decision that a statute satisfies the requirement of its constitution that the cession of jurisdiction be revocable only with the consent of "the people of" the State is a reasonable one, and it was properly honored by the court below.

Although we believe the issue was correctly decided below, we agree that the question whether Public Law 280 establishes a *federal* standard is of sufficient importance to warrant its resolution by this Court. Consequently, we join in the request that certiorari be granted on this question.

2. The second question presented is whether there is any inhibition in Public Law 280 against a partial State assumption of jurisdiction. For the reasons stated below (pp. 9–10, *infra*), we do not believe the validity of the 1963 statute—which asserts State jurisdiction over certain subject-matter only—is necessarily involved in this litigation.

At all events, we think the question was correctly decided by the court below. We believe that Public

Law 280 intended to permit partial assertions of subject matter jurisdiction by States provided they are not so narrow or fragmentary as to create an impractical maze of regulation. See *In re Hankin's Petition*, 80 S.D. 435, 125 N.W. 2d 839; cf. *Seymour* v. *Superintendent*, 368 U.S. 351. This would occur if a State attempted to assume jurisdiction over only part of a discrete subject category such as welfare, education or crimes. See *In re Hankin's Petition, supra.* Washington's statute was not of that kind. See note 3, *infra*. Nevertheless, because the issue is important and its resolution will affect the validity of similar statutes in the States of Idaho and North Dakota, if certiorari is granted it would seem appropriate for the parties to argue this question as well.

Another aspect of the "partial jurisdiction" problem is properly here, in any event. That question is whether a State may provide for jurisdiction on a tribe-by-tribe basis, as Washington has done. Although Congress did not specifically provide for approval by the Indian tribes when it enacted Public Law 280, we do not believe that it intended thereby to prevent a State from conditioning its assertion of jurisdiction on the consent of the affected tribes. We have been advised that there are no substantial practical difficulties in the administration of such a scheme because ordinarily a reservation is occupied by only a single tribe or by several who act through a single council or governing body. Several States other than Washington have enacted provisions extending juris-

diction on a tribe-by-tribe basis,[5] and these have never been challenged.

3. Our view that the validity of the 1963 statute (assuming jurisdiction over Indian territory only with respect to enumerated subject matter) is not involved here is premised on our belief that the 1958 proclamation (which extended State jurisdiction fully over the Quinault Reservation) remains effective despite the recent attempt to revoke it by the governor's subsequent proclamation in 1965.

We believe that Public Law 280 did not contemplate retrocessions of jurisdiction.[6] Congress anticipated that those States which desired to assume jurisdiction over Indian reservations and could accomplish that result under State law would do so. It did not, we believe, accord the States an option to assume jurisdiction and divest it at will. Compare *United States* v. *Unzeuta,* 281 U.S. 138; *Rogers* v. *Squier,* 157 F. 2d 948 (C.A. 9), certiorari denied, 330 U.S. 840.

The validity of the governor's 1965 revocation was not put in issue by the parties and it was not passed

[5] States having legislation similar to Washington's are: Idaho (see Idaho Code 57-5101—67-5103), Montana (see Rev. Code Mont. 83-801—83-806), and North Dakota (see North Dak. Cent. Code Ann. 27-19-01—27-19-13). See also Nevada (Nev. Rev. Stat. 41-430). Florida has extended complete civil and criminal jurisdiction over all Indian country within the State. Fla. Stat. Ann. 285.16. We are aware of no other states which have asserted jurisdiction over Indians pursuant to Public Law 280.

[6] A number of bills have been introduced recently to amend Public Law 280 so as to provide for retrocession. See *e.g.*, S. 253, 89th Cong., 1st Sess.; S. 966, 89th Cong., 1st Sess., at 111 Cong. Rec. 1801-1802.

on by the court below. We believe that the issue should be resolved now, however. The proclamation itself is official action which this Court may judicially notice, and its validity is of substantial and immediate significance. For, as matters now stand, neither the State of Washington—which treats the revocation as valid—nor the United States—which deems it a nullity—is administering its criminal or civil law (with the exception of the eight subjects enumerated in the 1963 statute) on the Quinault reservation. If certiorari is granted, we believe that the parties should be instructed to brief and argue this question.

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari should be granted and that the parties should be instructed to argue, among the other issues in the case, the validity of the governor's 1965 revocation of his proclamation of 1958.

Respectfully submitted.

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APRIL 1967.

APPENDIX

STATE OF WASHINGTON,
EXECUTIVE DEPARTMENT,
Olympia.

ALBERT D. ROSELLINI
Governor

A Proclamation by the Governor:

WHEREAS, on the 15th day of May, 1958, a Proclamation was issued by the Governor of the State of Washington proclaiming "The criminal and civil jurisdiction of the State of Washington shall apply to the Quinault Indian people, their reservation, territory, lands and country, and all persons being and residing therein" and,

WHEREAS, this Proclamation was issued under the authority vested in the Governor by virtue of Chapter 240, the Laws of 1957, and;

WHEREAS, under the provisions of Chapter 36, Laws of 1963, the State of Washington assumed civil jurisdiction over certain matters and;

WHEREAS, there has been continued litigation concerning the question of State jurisdiction over the Quinault lands and;

WHEREAS, I verily believe that it was not the will of the majority of the Quinaults to petition for State jurisdiction in 1958:

NOW, THEREFORE, I, Albert D. Rosellini, Governor of the State of Washington, do hereby proclaim that the Governor's Proclamation of the 15th day of May,

nineteen hundred and fifty-eight, proclaiming State jurisdiction over the Quinaults is hereby revoked and proclaimed null and void.

I urge that the Quinaults conduct a proper election under proper supervision requesting State jurisdiction. It is further proclaimed that this action shall have no effect on the civil jurisdiction under the provisions of RCW 37.12.010.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia this twelfth day of January, A.D., nineteen hundred and sixty-five.

/s/ ALBERT D. ROSELLINI,
Governor of Washington.

By the Governor:

/s/ VICTOR A. MEYERS,
Secretary of State.

U.S. GOVERNMENT PRINTING OFFICE: 1967